

ESTTA Tracking number: **ESTTA679205**

Filing date: **06/19/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Independent Health Association, Inc.
Granted to Date of previous extension	06/20/2015
Address	511 Farber Lakes Drive Williamsville, NY 14221 UNITED STATES

Attorney information	Ellen S. Simpson Simpson & Simpson PLLC 5555 Main Street Williamsville, NY 14221 UNITED STATES esimpson@idealawyers.com Phone:716-626-1564
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Applicant Information

Application No	86338931	Publication date	04/21/2015
Opposition Filing Date	06/19/2015	Opposition Period Ends	06/20/2015
Applicant	Vita Enrollment Solutions, LLC 7325 Janes Ave Woodridge, IL 60517 UNITED STATES		

Goods/Services Affected by Opposition

Class 036. First Use: 2013/02/01 First Use In Commerce: 2013/04/01 All goods and services in the class are opposed, namely: Advisory services in the field of employee benefits for group healthcare and business insurance offered to employees in addition to standard benefits such as medical, dental, life insurance including short term disability, long term disability, cancer insurance, accidental death and dismemberment
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Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	4222814	Application Date	06/17/2011
Registration Date	10/09/2012	Foreign Priority Date	NONE

Word Mark	INDEPENDENT HEALTH'S EVOLVE
Design Mark	INDEPENDENT HEALTH'S EVOLVE
Description of Mark	NONE
Goods/Services	Class 036. First use: First Use: 2011/06/02 First Use In Commerce: 2011/06/02 Administration of high deductible health care plans that include wellness assessment and incentives; Administration of high deductible health care plans that include wellness assessments and reward incentives that reward members for pointsredeemable for merchandise

U.S. Registration No.	4246856	Application Date	06/17/2011
Registration Date	11/20/2012	Foreign Priority Date	NONE
Word Mark	EVOLVE		
Design Mark	EVOLVE		
Description of Mark	NONE		
Goods/Services	Class 036. First use: First Use: 2011/07/17 First Use In Commerce: 2011/07/17 Administration of high deductible health care plans that include wellness assessment and incentives; Administration of high deductible health care plans that include wellness assessments and reward incentives that reward members for pointsredeemable for merchandise		

Attachments	85349155#TMSN.png(bytes) 85349209#TMSN.png(bytes) IHAO116US_opp.pdf(131579 bytes) Exhibit 1.pdf(104772 bytes) Exhibit 2.pdf(103106 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Ellen S. Simpson/
Name	Ellen S. Simpson
Date	06/19/2015

**IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of U.S. Service Mark Application Serial No. 86/338,931
Published in the *Official Gazette* on April 21, 2015

Independent Health Association, Inc.)	
)	
Opposer,)	
)	Opposition No. _____
v.)	
)	
Vita Enrollment Solutions, LLC)	
d/b/a Evolve Benefits)	
)	
Applicant.)	
_____)	

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

ATTN: Trademark Trial and Appeal Board

NOTICE OF OPPOSITION

Independent Health Association, Inc. (“**Opposer**”), formed in the State of New York, having a principal place of business at 511 Farber Lakes Drive, Buffalo, New York, 14221, believes that it will be damaged by registration of the mark EVOLVE BENEFITS shown in U.S. Service Mark Application Serial No. 86/338,931 filed by Vita Enrollment Solutions LLC d/b/a Evolve Benefits (“**Applicant**”) and hereby opposes the same.

As grounds for opposition, Opposer states as follows:

1. Opposer, Independent Health Association, Inc., formed in the State of New York with a principal place of business in New York, is a leading company in the field of managed health care, providing health care benefit plans and related administrative services, wellness,

disease management, and case management services, specialty pharmacy services, and pharmacy benefits management to health care providers, employers, plan subscribers, and other third-party providers of health care related services.

2. Upon information and belief, Applicant provides advisory services in the field of employee benefits for group healthcare and business insurance offered to employees.

3. Since at least as early as June 2, 2011, long prior to both the date of first use of the EVOLVE BENEFITS mark and the filing date of the application opposed herein, Opposer has been using, and continues to use, the service mark INDEPENDENT HEALTH'S EVOLVE in interstate commerce in connection with the administration of high deductible health care plans that include wellness assessment and incentives and the administration of high deductible health care plans that include wellness assessments and reward incentives that reward members for points redeemable for merchandise. The service mark INDEPENDENT HEALTH'S EVOLVE has become identified with Opposer and its services and is well known and famous in connection with Opposer's services.

4. Since at least as early as July 17, 2011, long prior to the filing date of the application opposed herein, Opposer continuously has used the service mark EVOLVE in interstate commerce in connection with the administration of health deductible health care plans that include wellness assessment and incentives and the administration of high deductible health care plans that include wellness assessments and reward incentives that reward members for points redeemable for merchandise. The service mark EVOLVE has become identified with Opposer and its services and is well known and famous in connection with Opposer's services.

5. Opposer is the owner of U.S. Service Mark Registration No. 4,222,814, dated October 9, 2012, pursuant to U.S. Service Mark Application Serial No. 85/349,155 filed on June

17, 2011 for the service mark INDEPENDENT HEALTH'S EVOLVE for use in association with the administration of high deductible health care plans that include wellness assessment and incentives and the administration of high deductible health care plans that include wellness assessments and reward incentives that reward members for points redeemable for merchandise in International Class 36 (Exhibit 1).

6. Opposer is also the owner of U.S. Service Mark Registration No. 4,246,856, dated November 20, 2012, pursuant to U.S. Service Mark Application Serial No. 85/349,209 filed on June 17, 2011, for the service mark EVOLVE for use in association with the administration of high deductible health care plans that include wellness assessment and incentives and the administration of high deductible health care plans that include wellness assessments and reward incentives that reward members for points redeemable for merchandise in International Class 36 (Exhibit 2).

7. For many years, Opposer has extensively used and promoted its services using its service marks EVOLVE and INDEPENDENT HEALTH'S EVOLVE. Opposer has developed exceedingly valuable goodwill with respect to its service marks EVOLVE and INDEPENDENT HEALTH'S EVOLVE. By virtue of its efforts, the expenditure of considerable sums for advertising and promotional activities, and by virtue of the excellence of its services, Opposer has developed exceedingly valuable goodwill with respect to the marks EVOLVE and INDEPENDENT HEALTH'S EVOLVE. Opposer's marks are well known to consumers and have been distinctive and famous since prior to the filing date of the application opposed herein.

8. By its Application Serial No. 86/338,931, Applicant seeks to register the mark EVOLVE BENEFITS for use in association with advisory services in the field of employee benefits for group healthcare and business insurance offered to employees in addition to standard

benefits such as medical, dental, life insurance including short term disability, long term disability, cancer insurance, accidental death and dismemberment, in International Class 36.

9. The opposed application was filed on July 16, 2014, claiming a date of first use in interstate commerce of April 1, 2013, both dates which are well after Opposer first commenced use of and/or registered its marks EVOLVE and INDEPENDENT HEALTH'S EVOLVE.

10. The opposed application was initially refused registration by the Examining Attorney at the U.S. Patent & Trademark Office based on a likelihood of confusion with Opposer's registration U.S. Service Mark Registration No. 4,246,856 for the mark EVOLVE. It appears that Applicant responded to the Office Action by arguing that its mark was not confusingly similar with U.S. Registration No. 3,132,131 for the mark EVOLVE, a registration owned by a third party which was not cited against Applicant's application. It further appears from the prosecution history that the Examining Attorney approved the application for publication notwithstanding that Applicant failed to submit arguments that its mark was not confusingly similar to Opposer's mark EVOLVE, the registration that was actually cited as a bar to Applicant's registration of its mark. Upon discovery of this issue, Opposer filed a Letter of Protest with the Deputy Commissioner for Trademarks with the U.S. Patent & Trademark Office on May 11, 2015, but such Letter of Protest was denied on May 18, 2015 on the ground that the approval was a matter of judgment for the Examining Attorney.

11. Applicant's mark, EVOLVE BENEFITS, is confusingly similar in sight, sound and meaning to Opposer's marks EVOLVE and INDEPENDENT HEALTH'S EVOLVE owned and used by Opposer. The use and registration of Applicant's mark EVOLVE BENEFITS would result in confusion, mistake and/or deception as to the source or origin of Applicant's

services, leading consumers to believe that they are somehow affiliated with, approved, sponsored or licensed by Opposer.

12. In an Office Action issued on November 4, 2014, Applicant was required to disclaim exclusive rights in the wording “BENEFITS” apart from its use in the mark in its entirety, as the Examining Attorney asserted such wording “appears in the identification of services and thus, is descriptive of the field or nature of the services being provided under the mark. Applicant accepted this disclaimer in a Response to Office Action filed on February 3, 2015. This disclaimer clearly establishes the “EVOLVE” wording as the predominant portion of Applicant’s mark, which portion is identical to Opposer’s EVOLVE mark and the EVOLVE wording in Opposer’s INDEPENDENT HEALTH’S EVOLVE mark.

13. Upon information and belief, Applicant’s mark, EVOLVE BENEFITS, is used in association with services in the field of advisory services in the field of employee benefits for group healthcare and business insurance offered to employees. Opposer’s marks EVOLVE and INDEPENDENT HEALTH’S EVOLVE are used in association with services in the field of managed health care, including employee group health care plans, employee benefits plans, and related administrative services.

14. Upon information and belief, Applicant’s mark, EVOLVE BENEFITS, is used in association with services marketed and provided to employers, group health care benefit administrators, and other such organizations. Opposer’s services also utilize similar channels of trade and are offered to buyers in the same or similar industries.

15. If Applicant is permitted to use and register Applicant’s mark for the services identified in the Application, confusion in trade, resulting in irreparable damage and injury to Opposer, inevitably would result by reason of the similarity between Applicant’s and Opposer’s

marks and the services offered thereunder. Any objection or fault found with the services marketed under Applicant's mark, EVOLVE BENEFITS, could reflect on, and injure, the reputation Opposer has established for the services provided under its aforesaid marks. If Applicant is granted the registration herein opposed, Applicant would obtain a *prima facie* exclusive right to use the mark set forth in its application for registration. Such registration would become a source of damage and injury to Opposer through the generation of confusion, mistake, and/or deception, the dilution of Opposer's marks and the diminution of Opposer's ability to control the quality of services offered thereunder.

16. Moreover, such registration would run contrary to the requirement that all doubts as to the likelihood of confusion must be resolved in favor of Opposer, and against Applicant, who has a legal duty to select a mark dissimilar to marks already in use.

17. Applicant's mark, as used on the services identified in the Application, would dilute, or be likely to dilute, the distinctiveness of Opposer's aforesaid marks, resulting in damage to Opposer, its goodwill and strength and value of its marks.

18. In view of the similarity in sight, sound and meaning between Applicant's mark EVOLVE BENEFITS and Opposer's aforesaid marks; the similarity between the respective services of Applicant and Opposer associated with Applicant's mark and Opposer's aforesaid marks; and the similarity of the channels of trade and customer base for Applicant's services and Opposer's services; Applicant's mark so resembles Opposer's aforesaid marks as to be likely to cause confusion, and/or to cause mistake, and/or to deceive.

WHEREFORE, Opposer prays that U.S. Service Mark Application Serial No. 86/338,931 be rejected, that no registration be issued thereon to Applicant, and that this opposition be sustained in favor of Opposer.

Opposer hereby submits the requisite filing fee in the amount of \$300.00 as required in 37 C.F.R. § 2.6(a)(17). Please charge any additional fees to Account No. 50-0822.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Ellen S. Simpson", is written over a light yellow rectangular background.

Ellen S. Simpson
Attorney for Opposer
Simpson & Simpson PLLC
5555 Main Street
Williamsville, New York 14221
(tel) 716-626-1564 / (fax) 716-626-0366

DATED: June 19, 2015

CERTIFICATION UNDER 37 C.F.R. §1.8

I hereby certify that this NOTICE OF OPPOSITION is being filed electronically with the United States Patent and Trademark Office utilizing the *Electronic System for Trademark Trials and Appeals* on this 19th day of June, 2015.



Ellen S. Simpson
Attorney for Opposer
Simpson & Simpson PLLC
5555 Main Street
Williamsville, New York 14221
(tel) 716-626-1564
(fax) 716-626-0366

CERTIFICATE OF SERVICE

I certify that a true copy of this NOTICE OF OPPOSITION was served upon the Applicant by depositing a copy thereof with the U.S. Postal Service, via first class mail, postage prepaid, directed to Applicant:

Mr. Benjamin Darnell
Evolve Benefits
7325 Janes Avenue
Woodridge, Illinois 60517-2350

Dated: June 19, 2015

By:



Ellen S. Simpson
Attorney for Opposer
Simpson & Simpson, PLLC
5555 Main Street
Williamsville, New York 14221
Telephone: (716) 626-1564
Facsimile: (716) 626-0366

Attorney Docket No. 0035.IHAO116US
Notice of Opposition against U.S. Service Mark Application Serial No. 86/338,931

Exhibit 1

United States of America

United States Patent and Trademark Office

INDEPENDENT HEALTH'S EVOLVE

Reg. No. 4,222,814

Registered Oct. 9, 2012

Int. Cl.: 36

SERVICE MARK

PRINCIPAL REGISTER

INDEPENDENT HEALTH ASSOCIATION, INC. (NEW YORK CORPORATION)
511 FARBER LAKES DRIVE
WILLIAMSVILLE, NY 14221

FOR: ADMINISTRATION OF HIGH DEDUCTABLE HEALTH CARE PLANS THAT INCLUDE WELLNESS ASSESSMENT AND INCENTIVES; ADMINISTRATION OF HIGH DEDUCTABLE HEALTH CARE PLANS THAT INCLUDE WELLNESS ASSESSMENTS AND REWARD INCENTIVES THAT REWARD MEMBERS FOR POINTS REDEEMABLE FOR MERCHANDISE, IN CLASS 36 (U.S. CLS. 100, 101 AND 102).

FIRST USE 6-2-2011; IN COMMERCE 6-2-2011.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 1,451,464, 1,814,250, AND 2,938,669.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "HEALTH'S", APART FROM THE MARK AS SHOWN.

SN 85-349,155, FILED 6-17-2011.

DANNEAN HETZEL, EXAMINING ATTORNEY



David J. Kyfos

Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

Requirements in the First Ten Years*

What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. *See* 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.*
See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*

What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or
reminder of these filing requirements.**

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. *See* 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. *See* 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

Attorney Docket No. 0035.IHAO116US
Notice of Opposition against U.S. Service Mark Application Serial No. 86/338,931

Exhibit 2

United States of America

United States Patent and Trademark Office

EVOLVE

Reg. No. 4,246,856

Registered Nov. 20, 2012

Int. Cl.: 36

SERVICE MARK

PRINCIPAL REGISTER

INDEPENDENT HEALTH ASSOCIATION, INC. (NEW YORK CORPORATION)
511 FARBER LAKES DRIVE
WILLIAMSVILLE, NY 14221

FOR: ADMINISTRATION OF HIGH DEDUCTIBLE HEALTH CARE PLANS THAT INCLUDE WELLNESS ASSESSMENT AND INCENTIVES; ADMINISTRATION OF HIGH DEDUCTIBLE HEALTH CARE PLANS THAT INCLUDE WELLNESS ASSESSMENTS AND REWARD INCENTIVES THAT REWARD MEMBERS FOR POINTS REDEEMABLE FOR MERCHANDISE, IN CLASS 36 (U.S. CLS. 100, 101 AND 102).

FIRST USE 7-17-2011; IN COMMERCE 7-17-2011.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 85-349,209, FILED 6-17-2011.

DANNEAN HETZEL, EXAMINING ATTORNEY



David J. Kyfos

Director of the United States Patent and Trademark Office

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